

Case No. 24-2081

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

Winnebago Tribe of Nebraska, a federally recognized Indian tribe,
Plaintiff-Appellant,

v.

United States Department of the Army, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia
Case No. 1:24-cv-00078-CMH-IDD

**BRIEF OF AMICUS CURIAE THE GREAT PLAINS TRIBAL LEADERS
HEALTH BOARD IN SUPPORT OF PLAINTIFF-APPELLANT AND FOR
REVERSAL**

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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(name of party/amicus)

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Signature: /s/ Frank S. Holleman

Date: 01/29/2025

Counsel for: Great Plains Tribal Leaders Health B

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STATEMENT OF INTEREST

The Great Plains Tribal Leaders Health Board (“GPTLHB” or “Board”) is an inter-tribal organization established by federally-recognized Indian Tribes to advance and serve the health needs of their members within Iowa, Nebraska, South Dakota, and North Dakota. The Board is governed by elected leaders of seventeen Indian Tribes¹ and the leadership of one tribally-operated Indian Service Unit (“SU”).² The Board’s mission is to improve the wellness of Native people in the region by providing quality healthcare, public health services, advocacy, and support in partnership with Indian Tribes. The Board serves thousands of Indians by assisting or representing member Tribes in their dealings with the federal and state governments on health issues, assisting the federal government in distributing health services, providing technical assistance to member Tribes to develop their own health programs, and providing policy analysis and recommendations to tribal

¹ Those Tribes are: Cheyenne River Sioux Tribe, Crow Creek Sioux Tribe, Spirit Lake Tribe, Flandreau Santee Sioux Tribe, Lower Brule Sioux Tribe, Oglala Sioux Tribe, Rosebud Sioux Tribe, Santee Sioux Tribe, Sisseton-Wahpeton Oyate, Standing Rock Sioux Tribe, Yankton Sioux Tribe, Turtle Mountain Band of Chippewa Indians, Winnebago Tribe of Nebraska, Three Affiliated Tribes of the Fort Berthold Reservation, Omaha Tribe of Nebraska, Sac & Fox Tribe of the Mississippi in Iowa, and Ponca Tribe of Nebraska.

² A SU is a unit of the federal Indian Health Service that operates health programs for Indians. The constituent SU is the Trenton Indian Service Area.

officials. GPTLHB also directly operates the Oyáte Health Center in Rapid City, South Dakota.

The Board has an interest in the physical and mental health and well-being of its service population in the Great Plains region. And as an organization operated by and for Indian Tribes, it has a particular interest in how tribal cultural practices and the healing of historical and present-day trauma experienced by Indian communities can improve health outcomes in those communities. The Board therefore has a unique perspective on the importance of repatriation of human remains under the Native American Graves and Repatriation Act (“NAGPRA”)—especially those of children removed from Indigenous communities during the federal government’s operation of Indian boarding schools.

In support of their argument below, undersigned counsel has interviewed employees of the Board and others who have experience with the health impacts of cultural practices, including repatriation. In particular, counsel have interviewed: Dr. Monique Apple, DSW (Ihanktonwan and Oglala Lakota), a Director of Clinical Behavioral Health at Oyáte Health Center; Dr. Donald Warne, MD (Oglala Lakota), a prominent scholar of Indigenous health issues and Co-Director of the Johns Hopkins Center for Indigenous Health; Mr. Marlin Under Baggage (Oglala Lakota), a descendent of survivors of the Wounded Knee Massacre and Co-Founder of Red

Feather Society; and Ms. Glorianna Under Baggage (San Carlos Apache), an educator on the Pine Ridge Reservation.

DISCLOSURES

Counsel for the Board wholly authored this brief, and no person other than the Board and its counsel contributed money intended to fund the preparation or submission of this brief. Plaintiff-Appellant is a member Tribe of GPTLHB, but no funds from Plaintiff-Appellant, or any other party, were used for preparation or submission of the brief.

The parties consent to the filing of this brief.

SUMMARY OF ARGUMENT

NAGPRA requires the repatriation of the remains of Samuel Gilbert and Edward Hensley, who were removed from their homes and died far away from their families, culture, and homeland. Plaintiff-Appellant, the Winnebago Tribe of Nebraska (“Tribe”), has explained why NAGPRA, 25 U.S.C. § 3005(a)(4), requires repatriation of Native American human remains at Carlisle Cemetery, regardless of whether it is a “holding” or “collection” as those terms are used in NAGPRA, 25 U.S.C. § 3003(a). If the Court nevertheless reaches the Tribe’s secondary argument, that the Carlisle Cemetery is a “holding” or “collection,” the Court should accept that argument and reverse. The Carlisle Cemetery is property of a federal agency, and it contains human remains that the Army brought together for the principal

purpose of interring the dead. Repatriating their remains to the Tribe is consistent with NAGPRA's purposes.

Repatriation will also benefit the Winnebago community. Removal of Native children from tribal communities to attend boarding schools was a historical trauma endured by Indian Tribes. That trauma still impacts Indian people's mental health, which effects their physical health. This trauma can be healed when Native people engage in cultural events or ceremonies that acknowledge the harm and seek to resolve it. Repatriation under NAGPRA allows for such events and ceremonies to occur, and the healing they promote has tangible benefits for mental and physical health.

ARGUMENT

I. The District Court Wrongly Held that NAGPRA Does Not Apply to The Remains of Samuel and Edward.

The District Court wrongly dismissed the Tribe's claim that the Defendants-Appellees ("the Government") violated NAGPRA by refusing to repatriate Samuel's and Edward's remains to the Tribe. *See* JA208-216. The District Court erred because 25 U.S.C. § 3005(a)(4) plainly requires the Government to repatriate the boys' remains to the Tribe and also because the Carlisle Cemetery is a "holding" or "collection" of a "Federal agency," which also triggers the Army's duty to repatriate Samuel's and Edward's remains. Repatriation would also be consistent with the purposes of NAGPRA. Samuel and Edward were removed to Carlisle as part of a

campaign to eliminate tribal culture and were buried in the Carlisle Cemetery without proper respect or consent. Repatriation would address these harms, which NAGPRA is designed to mitigate or prevent.

A. The Carlisle Cemetery is a “Collection” and “Holding” Under NAGPRA.

NAGPRA requires a Federal agency to repatriate Native American human remains within their possession and control when requested to do so by an Indian Tribe with cultural affiliation to the remains. 25 U.S.C. § 3005(a)(4). The District Court ignored NAGPRA’s plain text when it held that Section 3005(a)(4) only applies to Native American human remains in a “holding” or “collection.” *See* Opening Br. Arg. § I. But even if Section 3005(a)(4) were so limited, the Government would still be required to repatriate Samuel’s and Edward’s remains under NAGPRA because the Carlisle Cemetery is both a “holding” and a “collection.” *See id.* § II.

Section 3001 does not define “holding” or “collection.” To interpret those terms, the Court must “begin [its] analysis with the plain language.” *Blakely v. Wards*, 738 F.3d 607, 611 (4th Cir. 2013) (en banc) (citation omitted). “[W]e customarily turn to dictionaries for help in determining whether a word in a statute has a plain or common meaning.” *Id.* (quoting *Nat’l Coal. v. Allen*, 152 F.3d 283, 289 (4th Cir. 1998)). A court should then consider “the language itself, the specific context in which that language is used, and the broader context of the statute as a

whole.” *Allen*, 152 F.3d at 289 (quotation omitted). And if NAGPRA were ambiguous, it would “be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit,” since it was enacted for the benefit of the Indians. *Yankton Sioux Tribe v. U.S. Army Corps of Eng’rs*, 83 F. Supp. 2d 1047, 1056 (D.S.D. 2000) (quotation omitted). Application of these rules of interpretation shows that the Carlisle Cemetery is both a “holding” and “collection” possessed by the federal government.

“Holdings” are “[l]egally owned property, esp. land or securities,” *Black’s Law Dictionary* (12th ed. 2024), or “any property that is owned or possessed,” *Webster’s Third New International Dictionary* 1079 (2002) (“Webster’s”). The Carlisle Cemetery is unquestionably property possessed by the United States, which includes Native American remains that are also within its possession. *See Bethesda African Cemetery Coal. v. Hous. Opportunities Comm’n*, 332 A.3d 681, 710 (Md. 2024) (noting “at least as far as the common law of burial places is concerned, land containing the remains of the deceased is freely alienable – meaning it may be bought and sold privately, whenever transacting parties so desire” subject to “a court of equity’s ability to protect the repose of the deceased and the feelings of the living”) (footnote omitted); *see also* 25 U.S.C. § 3005(a) (describing repatriation responsibilities for “Native American human remains and objects possessed or controlled by Federal agencies and museums”). Second, a “collection” is “a number

of objects or persons or quantity of a substance that has been collected or has collected often according to some unifying principle or orderly arrangement,” Webster’s at 444; *accord Texas v. ATF*, No. 2:24-CV-89-Z, 2024 WL 2277848, at *6 (N.D. Tex. May 19, 2024). The remains at the Carlisle Cemetery are “objects or persons” and were collected there “according to some unifying principle”—the interment of bodies.

For the same reason, the Carlisle Cemetery also meets the implementing regulations’ definition of “collection” or “holding,” *see* 43 C.F.R. § 10.2; *see id.* § 10.10 (requiring repatriation where a “Federal agency ... has possession or control of a holding or collection that may contain human remains...”). The regulation defines a “holding or collection” as “an accumulation of one or more ... human remains for any temporary or permanent purpose, including: ... (5) Conservation; ... (11) Preservation; [or] (12) Public benefit” *Id.* § 10.4. Human remains are accumulated and preserved in cemeteries, which is a public benefit. *See Beatty v. Kurtz*, 27 U.S. (2 Pet.) 566, 585 (1829); *Evergreen Cemetery Ass’n v. City of New Haven*, 43 Conn. 234, 241 (1875) (“The use of land for a burying ground is a public use.”); *accord Bd. of Comm’rs v. Holladay*, 189 S.E. 885, 889 (S.C. 1937); *Memphis State Line R.R. v. Forest Hill Cemetery Co.*, 94 S.W. 69, 74 (Tenn. 1906).³

³ The Government argued below that a cemetery is not an “accumulation,” JA124, but an “accumulation” is a “something that has accumulated or has been

To be clear, Carlisle Cemetery falls far short of standards of commemoration and respect to which cemeteries are typically held. Remains were placed there callously and disrespectfully, without familial or tribal consent, in violation of the deceased's religious beliefs. JA22, 24-26. But what matters under the plain meaning of NAGPRA—and the implementing regulations—is the Army's *purpose*. The Army collected remains there in order to inter them, maintains the Cemetery as a place set apart for interment, and asserts that it does so to serve historic and public purposes, *see* JA44.

The statutory context in which these terms are used also shows that Carlisle Cemetery is a collection or holding. “Holdings or collections” are within a Federal agency's “possession or control.” 25 U.S.C. § 3003(a). “Possession” and “control” are not only exercised over museum collections. *Cf.* JA212-213; *supra* at 6. NAGPRA elsewhere describes the “control” of Native American cultural items “excavated or discovered on Federal or tribal lands,” 25 U.S.C. § 3002(a), and defines federal lands as those “controlled or owned by the United States,” *id.*

accumulated,” Webster's at 13, and “to accumulate” most properly means here to “amass” or “gather,” JA124. Plainly, human remains in a cemetery have been gathered there. In the Government's view, “accumulate” only means “to pile up.” JA124. That makes no sense in reference to a *collection* of any kind, *see supra* at 6-7, and is also contrary to the Government's own view that the only “collections” NAGPRA concerns are curated museum collections. *See Mallard v. U.S. Dist. Ct.*, 490 U.S. 296, 301 (1989) (words should be understood by their “ordinary and natural signification,” including among possible definitions in dictionaries).

§ 3001(5). So, lands and items located in or on federal lands, are the subject of federal “control.” And under the implementing regulations, a “Federal agency may have possession or control *regardless of the physical location* of the object or item,” and custody of leased materials “resides with the ... leasing ... or otherwise transferring museum or Federal agency,” 43 C.F.R. § 10.2 (emphasis added). So human remains may be possessed or controlled, wherever they may be, including when held by another pursuant to a lease. That surely encompasses more than curated museum collections.

Further, if NAGPRA were ambiguous, it would be read in favor of the Indians for whose benefit it was passed. *See Yankton*, 83 F. Supp. 2d at 1056. Repatriating remains from Carlisle Cemetery will help remediate the devastating effects of the former federal boarding school policy, by enabling the practice of Indian culture, religion, and ceremonies that the policy was intended to destroy. Moreover, the benefits of NAGPRA for Indian communities and the health of Indian people cannot be exaggerated. If there were doubt about whether the Carlisle Cemetery is a “holding” or “collection,” the clear benefits to Indian tribes of repatriation of remains at the Carlisle Cemetery means that NAGPRA should be so interpreted.

B. Repatriation of Samuel’s and Edward’s Remains is Consistent with NAGPRA’s Purposes.

The district court concluded that repatriating Native American remains in the Carlisle Cemetery would be contrary to the purpose of NAGPRA. JA213-214

(discussing *Thorpe v. Borough of Jim Thorpe*, 770 F.3d 255 (3d Cir. 2014)). That is not so. Setting aside the plain meaning of NAGPRA, which is determinative, *see supra* at 5-7, NAGPRA is intended to ensure that Indian remains are, or remain, *properly buried* with respect and dignity, consistent with Indian culture and consent. NAGPRA's goals are satisfied by repatriating the remains of these children taken from their Tribes and buried without consent or respect for their culture or tribal affiliation.

The legislative history makes clear that NAGPRA's protection of burial sites on federal lands, *see* 25 U.S.C. § 3002(a), was not intended to prevent repatriation of human remains such as those in Carlisle Cemetery. Supporters of the House bill that became NAGPRA described it as “returning native American remains and artifacts to their descendants,” “protecting tribal lands from further uninvited and unapproved excavations by the unscrupulous,” “ensur[ing] the repatriation of hundreds of sacred objects to native American communities to reverse several hundreds years of abuses of a people,” “protect[ing] native American burial sites from exploitation,” preventing the “pillaging” of burial sites and the “immoral and indecent treatment of the dead,” and ensuring “equal treatment and respect” for Indian remains. 136 Cong. Rec. 31,939-40 (Oct. 22, 1990) (Statements of Reps. Collins, Richardson, and Bennett). Senator Daniel Inouye further noted that one of the key historical abuses NAGPRA was intended to address, was that “[t]he desires

of Indians to bury their dead were ignored” and that “[i]n light of the important role that death and burial rites play in native American cultures, it is all the more offensive that the civil rights of America’s first citizens have been so flagrantly violated for the past century.” *Id.* at 35,678 (Oct. 26, 1990).

Keeping Samuel’s and Edward’s remains at Carlisle would perpetuate the very harms NAGPRA is supposed to mitigate or end. *See* JA21-22, 24-26. In life, these boys were taken from their homes as part of a boarding school policy that was designed to destroy Indian families and culture. That policy eventually killed them. The history of Indian boarding schools is part of the heartbreaking history of degradation of Tribes and their cultures and unequal treatment of tribal culture and religion which NAGPRA is intended to reverse.

The boarding school policy was intended to eliminate tribal culture and religion. A pivotal 1920s report explained that the federal government’s boarding school policy was implemented by:

educating the [Indian] children in boarding schools far from their homes, taking them from their parents when small and keeping them away until parents and children become strangers to each other. The theory was once held that the problem of the [Indian] could be solved by educating the children, not to return to the reservation, but to be absorbed one by one into the white population. This plan involved the permanent breaking of family ties, [M]any children today have not seen their parents or brothers and sisters in years.

Lewis Meriam et al., *The Problem of Indian Administration* 574 (1928),

https://narf.org/nill/documents/merriam/r_merriam_chapter11_part1_family.pdf.

Carlisle was the flagship of this policy. And in addition to breaking family ties, it imposed demeaning and demanding conditions on Indian children that killed many of them, including Samuel and Edward. As former-President Biden recently noted when establishing the Carlisle Federal Indian Boarding School National Monument:

All children at the Carlisle School experienced a regimented daily schedule starting at 6:00 a.m. and concluding with Taps and room inspection at 9:00 p.m. Sunday school, chapel services, Catholic instruction, and Bible study classes were required. Carlisle School instructors also imposed strict rules about teaching English and prohibited the children from speaking their native languages—a rule that was often enforced with corporal punishment.

....

Carlisle School leaders also used the children's labor to perform maintenance, construction, and operations work on the campus. Several buildings—including a large brick printing office, a gymnasium, a hospital, doctor's quarters, a model home, a laundry building, the Leupp Indian Art Studio, and a warehouse—were primarily constructed by the youths of the Carlisle School.

....

Conditions at the Carlisle School—located in a remote area over a thousand miles away from many children's homes—were unfamiliar and harsh. Children lived in close quarters and were exposed to diseases they had not encountered previously. More than 180 children died while attending the Carlisle School; many of them are buried in marked gravesites at the Carlisle Barracks Main Post Cemetery.

Proclamation No. 10870, 89 Fed. Reg. 100,289, 100,291-92 (Dec. 9, 2024).⁴

⁴ The National Monument does not include the Carlisle Cemetery. *See id.* at 100,297.

The intent and effects of the federal boarding school policy were to disrupt tribal culture and religious practices and sever children's relationships with their families and Indian Tribes. That violated basic human dignity and civil rights. When children died there, they were not returned to their families for respectful burial. They were instead buried far away from their homes, without familial or tribal consent and without the burial and death rites required by their cultures and religions.⁵ Samuel's and Edward's burials at Carlisle Cemetery therefore cannot be compared to burials that NAGPRA protects and are not consistent with the respect for Indian rights and religion that animates NAGPRA.

Repatriation of Samuel's and Edward's remains will have positive impacts, which *are* consistent with NAGPRA's purposes. A House sponsor of NAGPRA, then-Rep. Ben Nighthorse Campbell, explained that

in the past several years the United States Government has done much to retrieve the human remains of our brave service men and women who died during the Vietnam war. Sparing little so that the remains of these fine people can be brought home to the ones who loved them, buried with full military honors and by the wishes of their families. *We now have the opportunity to continue and extend this stance to native Americans so that their ancestors can finally be put to rest.*

⁵ Samuel's and Edward's remains also cannot be compared to the "human remains buried in accordance with the wishes of the decedent's next-of-kin" at issue in *Thorpe*, 770 F.3d at 264; *see* 25 U.S.C. § 3001(13) (acknowledging federal agencies' and museums' "right of possession" to include human remains that were freely given by the decedent's next-of-kin).

136 Cong. Rec. 31,938 (Oct. 22, 1990) (statement of Rep. Campell) (emphasis added). The return of Samuel and Edward pursuant to NAGPRA will enable their community to engage in ceremonies and spiritual practices to honor them, grieve their passing, and grant their respectful repose to their remains. That will in turn benefit the entire community. As Mr. Under Baggage explains, in his Lakota community:

The proper way to handle the artifacts and the remains will help people to get stronger. We have seven ceremonies. When you bring remains, if they are identified, they are given a Lakota name and an eagle feather (for boys) and eagle plume (for girls) so their ancestors will recognize them, to be honored and released in a positive way. That is one of the positive things in our community. Previously, our people would give our children Lakota names, and they will accept the spirits back and will introduce positive things into the communities. Now you can recognize these young spirits who went to boarding school.

Repatriation in this instance is also consistent with the general principle that it is sometimes necessary to remove and rebury the dead to ensure their respectful and appropriate repose consistent with religious practices or to ensure burial with family. *See, e.g., Radomer Russ-Pol Unterstutzung Verein of Baltimore City v. Posner*, 4 A.2d 743, 746 (Md. Ct. App. 1939); *Welch v. Faulkner*, 575 S.W.3d 448, 452 (Ark. Ct. App. 2019); *In re West*, 801 S.E.2d 237, 244 (W.Va. 2017) (citing *Lavigne v. Wilkinson*, 116 A. 32, 33 (N.H. 1921); 22A Am. Jur. 2d *Dead Bodies* § 65 (2013)). Unfortunately, Samuel's and Edward's remains were not treated or buried in a respectful manner. *See* JA24-26. They would receive respectful and appropriate

treatment if repatriated. As Justice Cardozo opined, “[t]he dead are to rest where they have been laid unless reason of substance is brought forward for disturbing their repose.” *Yome v. Gorman*, 152 N.E. 126, 129 (N.Y. 1926). Such “reason[s] of substance” are provided in this instance by satisfying NAGPRA, and the benefits that flow from repatriation, which we now describe further.

II. Repatriation Benefits the Health of Indian Communities.

Indian Tribes and Native individuals have suffered from historical trauma and unresolved grief as a result of centuries of devastating federal policies, of which the removal of Indian children to boarding schools was a significant part. Historical trauma and grief continue to negatively impact the mental and physical health of tribal communities. The Board deals with these impacts every day. But research shows these impacts can be reversed through rebuilding connections to Native identity and native culture and ceremonies that allow expression of grief. Repatriation of ancestors and family members is a key part of this process. The implementation of NAGPRA in this case will therefore have positive effects, consistent with NAGPRA’s text, goals, and policies.

A. The Trauma Inflicted by the Boarding School Policy Continues to Impact Indian Communities’ Mental and Physical Health Today.

Historical trauma “refers to a complex and collective trauma experienced over time and across generations by a group of people who share an identity, affiliation, or circumstance.” Nathaniel Vincent Mohatt et al., *Historical Trauma as Public*

Narrative, 106 Soc. Sci. & Med. 128, 128 (2014). Several scholars have argued that the placement of Native children in federal boarding schools constitutes such a historical trauma.

The term historical trauma, which was “originally introduced to describe the experience of children of Holocaust survivors,” also describes the experiences of Indigenous groups that have shared “a ‘trauma’ or wounding” and for whom “the trauma spans multiple generations, such that contemporary members of the affected group may experience trauma-related symptoms without having been present for the past traumatizing event(s).” *Id.* Research has shown that, among Tribes in the Great Plains, “historical trauma affects psychological health through the experience of loss,” and that “the frequency of thinking about losses associated with historical traumas: is associated with distressed feelings; is distinct from depression; and is a significant source of distress over and above other proximate stressors, such as childhood adversity and negative life events.” *Id.* at 129.⁶ Removal of children during the boarding school policy was such a trauma that “disrupted culture-based protective factors, community systems, and parenting knowledge, thus leading to

⁶ Citing Les B. Whitbeck et al., *Conceptualizing and Measuring Historical Trauma Among American Indian People*, 33 Am. J. of Cmty. Psych. 119 (2004); Les B. Whitbeck et al., *Depressed Affect and Historical Loss Among North American Indigenous Adolescents*, 16 Am. Indian & Ala. Native Mental Health Rsch. 16 (2009); Melissa L. Walls & Les B. Whitbeck, *Distress Among Indigenous North Americans*, 1 Soc’y & Mental Health 124 (2011).

increased psychosocial risk, inadequate parenting, and health disparities in this population.” *Id.*⁷

As a result of historical trauma and its continuing impacts, Native Americans also experience what researchers call disenfranchised grief, which is “grief that persons experience when a loss cannot be openly acknowledged or publicly mourned.” Maria Yellow Horse Brave Heart & Lemyra M. DeBruyn, *The American Indian Holocaust*, 8 Am. Indian & Ala. Native Mental Health Rsch. 60, 66 (1998) (“Brave Heart”) (citing Kenneth J. Doka, *Disenfranchised Grief* (1989)). Disenfranchised grief intensifies “emotional reactions such as anger, guilt, sadness, and helplessness.” *Id.* at 67. Without “rituals to facilitate the mourning process,” the resolution of grief can be severely limited. *Id.* “Mourning that has not been completed and the ensuing depression are absorbed by children from birth on. Unresolved trauma also has been found to be intergenerationally cumulative, thus compounding the subsequent health problems of the community.” Eduardo Duran

⁷ Citing Christopher D. Campbell & Tessa Evans-Campbell, *Historical Trauma and Native American Child Development and Mental Health in American Indian and Alaska Native Children and Mental Health* (Michelle C. Sarche et al., eds. 2011); Allison Crawford, “*The Trauma Experienced by Generations Past Having an Effect in Their Descendants*”, 3 Transcultural Psychiatry 339 (2013); Joseph P. Gone & Joseph E. Trimble, *American Indian and Alaska Native Mental Health*, 8 Ann. Rev. of Clinical Psych. 131 (2012); Laurence J. Kirmayer et al., *The Mental Health of Aboriginal Peoples*, 45 Can. J. of Psych. 607 (2000).

et al., *Healing the American Indian Soul Wound* 342, in *International Handbook of Multigenerational Legacies of Trauma* (Yael Danieli ed., 1998) (citations omitted).

The children at Carlisle were removed from their Tribes to a far-off place where the Government tried to eliminate their culture and sever their bonds with their families and communities. The deaths of those children at Carlisle, and their burial far from home, provide stark examples of cultural disruption and historical trauma that cannot be adequately grieved without repatriation. Dr. Apple explains

[t]he location of where someone is buried, to us is an important factor in completing the life cycle of our loved ones. When you look at the location and the spiritual connection to the place of birth and place of her ancestors, including her grandmother and grandfathers, that is a testament to the connection she has spiritually to her people, to her tribal nation. That's where she belongs.

NAGPRA was intended to achieve this result, by repatriating remains to their communities and Indian Tribes.

In contrast, Dr. Apple explains, the children at Carlisle “were taken away” and “didn’t have a choice where they were buried. Their parents didn’t have a choice.” These losses resonate today. Ms. Under Baggage explains that “[t]he first impact” of removal of a loved one who dies away from the family is

the devastation of loss of life and not being permitted to grieve and restore the family. And the extended time that a family must live with that—to have a relative at distance and not being able to grieve. The community is impacted by historical trauma, intergenerational trauma, so they are hit from all different directions.

And “so long as the remains are out there, there is dysfunction in the communities, anger directed at one another because they cannot articulate it.”

Historical trauma had devastating effects on the transmission of Native culture, which continues to affect Native communities and individuals. Dr. Warne writes

[f]rom a traditional perspective, the loss of ancestral homelands, culture, language and other components of traditional life has led to a deeply rooted loss of identity as Native people. This sense of loss can be seen as spiritually and emotionally based imbalance that has resulted in self-destructive behaviours, including alcoholism, substance abuse, domestic violence and suicide.

Donald Warne, *Traditional Perspectives on Child and Family Health*, 10 Paediatrics & Child Health 542, 543 (2005) (“Warne 2005”). Historical trauma contributes to the “high rates of suicide, homicide, accidental deaths, domestic violence, child abuse, ... alcoholism, ... and other social problems” experienced by Indian communities. *Brave Heart* at 60; *see also* Mohatt et al., at 129.

These impacts are directly linked to the boarding school experience of many Native communities in North America, including the Winnebago Tribe. Through studies of Canadian First Nations, which were subject to Indian residential schools like the United States’ Indian boarding schools,⁸ researchers have found that:

⁸ U.S. Dep’t of Interior, *Federal Indian Boarding School Initiative Investigative Report* Vol. II, at 67-72 (2024), https://www.bia.gov/sites/default/files/media_document/doi_federal_indian_boarding_school_initiative_investigative_report_vii_final_508_compliant.pdf.

a family history of forced boarding school attendance and removal from one's family and community is associated with a number of subsequent behavioral health challenges in later generations, including: increased exposure to sexual violence and involvement in child welfare systems, injection drug use, current depressive symptoms and increased exposure to trauma, and a history of abuse associated with suicidal thoughts and attempts.

Mohatt et al., at 129.⁹ Dr. Apple elaborates:

The historical trauma piece has been studied, and it is proven it impacts negatively on all social and emotional and physical elements of indigenous peoples. I work here in the health system. I've worked here for a long time, looking at how to address these social issues and health disparities. It all leads back to that grievance process. People are grieving. There's a residue that's been placed on us from our ancestors who perished back then. How do we wipe that away and how do we cleanse that away if we're still grieving?

B. Cultural Renewal, Including Connection with Native Culture Promoted by Repatriation through NAGPRA, Produces Public Health Benefits.

These impacts can be mitigated, and reversed, by cultural practices and revitalization like repatriation. Scholars have shown that cultural revitalization in Native communities, including efforts to acknowledge past loss and trauma and express grief, produces benefits for mental health—which cannot help but benefit

⁹ Citing Margo E. Pearce et al., *The Cedar Project*, 66 Soc. Sci. & Med. 2185 (2008); Mark Lemstra et al., *Risk Indicators Associated with Injection Drug Use in the Aboriginal Population*, 24 AIDS Care 1416 (2012); Amy Bombay et al., *The Impact of Stressors on Second Generation Indian Residential School Survivors*, 48 Transcultural Psych. 367 (2011); Brenda Elias et al., *Trauma and Suicide Behaviour Histories Among a Canadian Indigenous Population*, 74 Soc. Sci. & Med. 1560 (2012).

people's physical health. "[T]he return of cultural objects can help right the wrongs of history and there is a purpose to the reburial of human remains ... [and] [r]emembrance, in whatever form Indigenous communities conduct it, is important in dealing with loss and grief." Justyna Ladosz, *The Return of Cultural Objects and Human Remains as a Way of Healing the Historical Trauma of Indigenous Communities*, 23 *Museological Rev.* 115, 122 (2019). As Dr. Apple explains,

it's a heavy weight to carry when you're trying to heal something of that magnitude, generations thick of trauma, and looking forward to the future and how you heal that future. Bringing our relatives home is a benefit. It's a huge gesture by the American federal system.

Dr. Warne and his research partner have written that a "pathway toward future elimination of [Native] mental health disparities" is "grounded in local [Native] knowledge, activities, and institution in the context of community projects of cultural reclamation and tribal self-determination.... 'Individuals can continue the healing process through individual, group and family therapy as well as attending to their own spiritual development. Tribes need to facilitate communal grief rituals, incorporating traditional practices.'" Donald Warne & Denise Lajimodiere, *American Indian Health Disparities*, 9 *Soc. & Personality Psych. Compass* 567, 575 (2015) (quoting *Brave Heart* at 70). "[T]reating and preventing alcohol abuse and other self-destructive and family destructive behaviors requires a spiritual healing process and a return to traditional values." Warne 2005, at 543. Dr. Warne further explains that "[p]erhaps the first and most important step toward reducing health

disparities is to identify and strengthen local cultural belief systems. The traditional ways of the Lakota and other tribes provide a culturally appropriate, holistic and meaningful way to promote community health.” *Id.* at 544.

Studies of Indigenous people in Canada and California have shown that, among these populations, an increase in knowledge and practice of Indigenous culture is associated with increased personal happiness, which is in turn associated with improved health. Paul Masotti et al., *The Culture is Prevention Project*, 23 BMC Pub. Health 8 (2023). Indigenous people who reported feeling connected with their Indigenous identity and spirituality were more likely to report feelings of hope about the future and satisfaction with life, and those who reported connection with indigenous traditional practices reported improved mental health and wellbeing. *Id.* at 6. A connection to Indigenous identity, spirituality, and tradition was correlated with lower rates of depression, and of substance and alcohol use and abuse, and those who reported connection to native identity, spirituality, and tradition reported that they experienced fewer days of bad physical health. *Id.* at 6-7. Researchers concluded:

[g]iven that the loss of culture has negatively impacted the health and well-being of Indigenous Peoples, we argue that the degree of reclaimed traditional culture or increased cultural connectedness is an important health-related outcome measure which at times may be more important than the reduction in frequency of some risky behaviors or risk factors commonly the focus of Western modalities.

Id. at 8.

Research in Canadian Indigenous communities supports the conclusion that Indigenous cultural practices lead to better public health outcomes. Among those communities which engage in cultural self-determination by opening cultural centers or promoting cultural practices in their communities, suicide rates are 23% lower than they are in Indigenous communities that do not have such programs. Michael J. Chandler & Christopher E. Lalonde, *Cultural Continuity as a Hedge Against Suicide in Canada's First Nations*, 35 *Transcultural Psychiatry* 191, 212 (1998). The researchers explained that “First Nations communities vary dramatically in the rates of youth suicide that they evidence,” but “these differences are strongly and clearly associated with” tribal engagement “in community practices that work to help preserve and restore their Native cultures.” *Id.* at 212-13.

NAGPRA empowers Tribes to manage the repatriation process, which enables Native communities to engage in ceremonies and rites associated with death and proper burial, which are the very practices that NAGPRA was intended to foster and respect, *see supra* at 10-11. Participation in such ceremonies and rites serve to acknowledge the community's grief and loss and can result in the communal benefits discussed *supra* at 21-23. Members of Native communities benefit directly when they engage in ceremonies that recognize the harm done in the past and acknowledge and heal the trauma. One researcher described the “Lakota intervention model,”

which “includes catharsis, abreaction, group sharing, ritual, and communal mourning,” and concluded:

[E]ducation about the historical trauma leads to increased awareness about trauma, its impact, and the grief-related affects. The process of sharing these affects with others of similar background and within a traditional Lakota context leads to a cathartic sense of relief. A healing and mourning process ... result[s] in a reduction of grief affects, an experience of more positive group identity, and an increased commitment to continuing healing work on both an individual and a community level.

Duran et al., at 351. Researcher Maria Yellow Horse Brave Heart found that the Lakota intervention helped with everyone’s grief resolution, and almost 75 percent found it very helpful in other aspects of their mental health. *Id.* “Ninety-seven percent felt they could now make a constructive commitment to the memory of their ancestors. ... All respondents felt better about themselves after the intervention,” with some 75 percent expressing high agreement that the intervention helped them overcome feelings of cultural shame. *Id.*

These impacts are illustrated further by Mr. Under Baggage’s comments on a recent repatriation of the remains of an Indian person who was taken from her Indian community by a non-Indian soldier after the Wounded Knee Massacre:

She suffered and died at a young age, 29 years old. Recently, her remains were brought back, and her family held a ceremony, she was given a Lakota name, and she was able to return with her ancestors. As a result, a lot of positive things are happening in Lakota communities. They continue doing things in a different manner, to come to peace with what took place there. The people suffered a lot at Carlisle. The repatriation brings healing.

Unfortunately, however, continued application of the Army's Regulation rather than NAGPRA will frustrate repatriation of other remains, such as Samuel's and Edward's. The intentional disruption of familial connections, incomplete records, and the passage of time can make it impossible to identify close family members who could request return of remains. Under NAGPRA, an Indian Tribe can fill that gap by requesting repatriation under 25 U.S.C. § 3005(a). Under the Army's implementation of its Regulation 290-5 (2020), they cannot. *See* JA181. The "closest living relative" must make the request to return human remains, and a Tribe cannot, JA38-40, 180-81, and there is nothing that prevents the Army from changing its implementation of Regulation 290-5 at any time at its discretion, including to allow removal of human remains only when "all close living relatives" request it by notarized statements, *see* Reg. 290-5, § 3-7(b)(2).

The connections between Indigenous communities and deceased children at Carlisle also extend more broadly than between blood relatives.¹⁰ For this reason, repatriation has positive effects beyond blood relations. Dr. Apple explains:

It's not as if people are so removed from their history and ancestry, so that they don't care when there's a repatriation. It's fresh in their minds and hearts. So, if they receive remains, it's part of a connection to their heritage and relatives that they lost. It doesn't have to be a blood relation. There's still an emotional attachment to that person who died. Acknowledging that grief and the cultural ceremonies and practices that

¹⁰ NAGPRA's provision for *tribal* requests for repatriation recognizes that, while Regulation 290-5 does not. *See* JA38-40, 180-81.

we have whenever someone passes away within our family system or tribal group, it's a wide-reaching impact.

She continues:

When we acknowledge the kinship within a tribal nation, that is healing within itself. Imagine if someone took your own mother or father, or child or grandchild, or niece or nephew away from you and you have no closure from that person's life ending. You carry that, whether you realize it or not; it's a trauma you're carrying. So put yourself in the shoes of the people who are seeking repatriation of their relatives. It's a tragedy that you don't wish on anybody.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order dismissing the Winnebago Tribe's complaint.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

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